

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Master-in-Equity

2017-001379
Case No. 2013-CP-23-01810

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JUL 11 2017

SC Court of Appeals

John D. Hatcher, Rachel Shaluly, James F. Gilbert,
Molly A. Miller, and Michael Stheney, individually
and as members of the Architectural Committee of
Mill Creek Estates,

Respondents,

v.

Ronald J Ferguson, Ronald E. Ferguson and
Susan M. Ferguson,

Appellants.

APPELLANTS' RESPONSE TO PLAINTIFFS' MOTION

The Defendant(s)/Appellants hereby would herein introduce for the record the following response to the Plaintiff/Respondents "Motion".

Appellants would ponder the Rules of Professional Conduct, such as Rule 3.1, 3.3, 4.1 and 4.4 in reading the Plaintiff's "motion".

RELEVANT APPEAL

The record should duly reflect that this is the same attorney who sought to intervene in Civil Action 2013-CP-23-05102, which went to this Court on Interlocutory Appeal as 2015-000593 and was summarily dismissed. On June 23, 2017, an Order was issued recalling the Remittitur for rehearing of

the matter which addresses the lower court entering an order granting intervention in contravention of Rule 24(c), SCRCP, and also failed to disclose ex parte communications with Master-In-Equity Charles B. Simmons, going back two months prior to the filing of the motion for intervention and is a relevant factor for a state or federal court to consider in determining whether to grant intervention.

In this specific instance, South Carolina courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. *Davis v. Jennings*, 304 S.C. 502, 504 405 S.E.2d 601, 603 (1991). Failure to satisfy any one of the four requirements precludes intervention. *Ex Parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993). The record has developed to show that as Brown and Simmons engaged in conduct violative of 28 U.S. Code §1446(d) and state law during October 2014, they were also discussing a pending hearing of 2013CP2305102 before another court. While Judge Leticia Verdin had public hearings in that case in Both November and December, it was only after an Order was issued that Brown felt compelled to file pleadings in that case in hopes of Simmons salvaging some semblance of his claims. Though Simmons has an obligation to disclose the ex parte communications with Brown under the Judicial Cannons, he has instead retained counsel and is making claims of judicial immunity. Likewise, Brown disregarded the Rules of Professional Conduct and did not disclose to the Court the knowledge of the case and ex parte communications.

Appellants would also have the record specifically note that the ex parte communications between Brown and Simmons in October 2014, were not disclosed as required under Judicial Cannon 3(B)(7) despite a Motion for Recusal – which is part of the “discovery order” in this appeal. Moreover, that is not an isolated instance between the two involving ex parte communications or conduct that violates state and federal law.

The two initially began ex parte communications in September 2014. This led to them engaging in a hearing involving this specific case in violation of 28 U.S. Code §1446(d) with an Order being signed on October 29, 2014. Based on relevant South Carolina Supreme Court precedent Simmons actions where not merely erroneous but null and void. See Davis v. Davis, 267 S.C. 508, 229 S.E.2d 847 (1976) (concluding that all orders issued by state court after proceeding was removed to federal court were void); 77 C.J.S. Removal of Cases § 154 (Supp. 2013) ("Proceedings in the state court after the requirements for removal are met are not merely erroneous, but null and void. No subsequent pleadings can be filed in the state court." (footnotes omitted)).

Then another ex parte communication which has yet to be disclosed by the parties on the record, but already under government scrutiny, is from March 4, 2015, and originating from Brent Boyd to Simmons then goes on disseminate material that is statutorily classified as confidential and exempt from civil proceedings under S.C. Code §§ 40-59-90, 40-1-190 and codified as a criminal act at §40-59-200.

Appellants having introduced a brief history of Brown's violative conduct with the judiciary who signed the "discovery order" drafted by Brown, we turn to the more pressing matters of this appeal.

JURISDICTION

S.C. Code §14-3-330 provides, "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b)

grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action....”

The South Carolina Supreme Court has narrowly defined an order “involving the merits” as an order that “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780 (quoting *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)).

BACKGROUND

On April 1, 2013, an appropriate date, Brown filed a Complaint naming “Ron Ferguson” as a “Defendant” and (in this case) claims to represent some “architectural committee of mill creek estates” that is not recognized in any restrictive covenants on file with the Register of Deeds in the County of Greenville nor recognized by the Secretary of State as an entity authorized to conduct business. The Complaint does not contain any type of criteria to identify the alleged property for which is allegedly in violation, such as an address, lot number, or PIN/Tax Map number. In fact, there is not even a lawful property owner within the County of Greenville records bearing the name “Ron Ferguson”.

The “Motion” references a prior appeal which is actually John D. Hatcher, et al v. Ron Ferguson, Case Number 2013-002360. Respondents seem to have missed the rest of the Order, with the finding Ronald J. Ferguson was not subject to the order.

Similarly, the latest “discovery order” is suddenly styled with the names Ronald J. Ferguson, Ronald E. Ferguson and Susan M. Ferguson. The question being, how did a Complaint filed on April 1, 2013 go from naming an organization that does not exist with a Defendant of “Ron Ferguson” to naming “Ronald J. Ferguson, Ronald E. Ferguson and Susan M. Ferguson”.

SUBSTANTIVE DUE PROCESS

In addressing the “Motion” Appellants will reflect that a Complaint is filed with a court, a party

is served, and then that party is entitled to certain due process standards and ability to file a counter or cross-complaint. In the instant action none of the Appellants are named in the original complaint, nor is there any record any of them have been served in any of the alleged “orders”.

Without debating the multitude of possibilities that could be presented, we shall simply look at two points:

- 1) Naming or adding persons to civil litigation; and,
- 2) Judiciary entering orders against persons when they lack jurisdiction over the person or matter.

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A basic look at the complaint finds that none of the Appellants were named in the Complaint. There is no evidence of service upon any of such. There is no Motion under Rule 15 that names any of them in an amended complaint. Ronald J. Ferguson did move at one point to intervene in the matter, but such was not granted.

The short and sweet of it being Simmons queried why the alleged discovery order issued against “Ron Ferguson” was not complied with? The other parties are not named in the complaint or subject to the court's jurisdiction as stated by the South Carolina Court of Appeals and each possess their own rights in the litigation. Simmons response? That is your excuse? You know about the order but are not part of the suit or named in the order so you are interfering with the litigation?

South Carolina's Rules of Civil Procedure cover the filing of a complaint, service of such, the response and options related thereto. Simply put, where Brown demonstrated his usual incompetence, he and Simmons simply decided that creating an Order changing the parties in the matter would suffice. This effectively denied one or more of the parties substantive due process from being able to challenge service, respond to the complaint, file counter suit against parties of their choosing, address personal or subject matter jurisdiction of the court. Prior South Carolina Chief Justice Jean Hoefler Toal penned the majority ruling that a trial court which interferes with discovery matters prematurely

violates a parties constitutional due process rights.

Where one or more of the parties were not part of the complaint, had not been served, were not part of the alleged “prior discovery orders” and where the judiciary acted contrary to the judicial canons, without color of authority, and subsequently issues an Order making individuals parties while divesting them of multiple constitutional rights – including defenses.

The South Carolina Supreme Court reversed a decision of the court of appeals, which dismissed as interlocutory an appeal that prevented [Plaintiff] “from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing.” *Morrow v. Fundamental Long-Term Care Holdings, LLC*, Op. No. 27532 (S.C. June 17, 2015).

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While judges typically have a history of ruling that errors by other judges affecting the litigants are something that can be corrected through a new trial. While legislative acts are beginning to address a right of interlocutory appeal in civil actions to address judicial conduct, historically the courts have held time and cost factors are generally not considered relevant. However, in this specific case, there are facts to demonstrate that ex parte conduct took place among opposing counsel and the judiciary, hearings were held with orders filed in contravention of federal law – and to which state precedent finds the judiciary acted not merely erroneously, but without any jurisdiction. Building on the actions were null and void comes a plethora of rulings finding that any conduct or orders predicated upon those action are without authority. Thus, where the fountain was tainted the waters that have flowed through through as likewise tainted.

"A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4)[, SCRCPP]." *Gainey v. Gainey*, 382 S.C. 414, 424, 675 S.E.2d 792, 797 (Ct. App. 2009). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect" *Id.* (quotation marks and citation omitted). A court, lacking

subject matter jurisdiction, cannot enforce its own decrees. It would serve no useful purposes to determine issues submitted to the court since the jurisdiction as to subject matter can be raised at any time, and if the case were remanded to the family court, it would have no authority to carry out its previously ordered mandate. *Hallums v. Bowens*, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993). See *Simmons v. Simmons*, 370 S.C. 109, 116, 634 S.E.2d 1, 4 (Ct. App. 2006) ("It is axiomatic that an order entered by a court without subject matter jurisdiction is utterly void."). *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 686 S.E.2d 683 (2009) (a decision issued without subject matter jurisdiction is void).

In the instant case, Simmons knew the matter had been removed to United States District Court and the Clerk of Court duly filed the notice of removal. Nonetheless, Simmons chose to hold a "scheduling hearing" without benefit of record and then entered an order on October 29, 2014. That order contains verbiage acknowledging the matter was before the federal court. It is without question the conduct of the proceedings and subsequent order were product of actions taken "under color of law" but without "subject matter jurisdiction."

The Supreme Court has carved out three exceptions. See *Erwin Chemerinsky*, *Federal Jurisdiction* § 8.6 (2d ed. 1994). First, no judicial immunity exists if the judge acts in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978). Second, judicial immunity extends only to judicial acts. *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). Finally, judges cannot claim judicial immunity for suits seeking only prospective, injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). "[T]he relevant standard for judicial immunity is whether the judicial official acted in 'the complete absence of all jurisdiction.'" *Bare v. Atwood*, 204 N.C. App. 310, 315 (2010) (quoting *Mireles v. Waco*, 502 U.S. 9, 12 (1991)). "[T]here is a fundamental difference between exceeding authority and acting in the complete absence of all jurisdiction." *Id.*, at 316.

SUMMARY

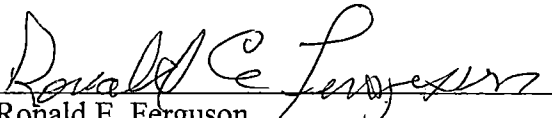
South Carolina Supreme Court dictum provides that when an interlocutory order affects a substantial right or affects the proceedings, appeal shall be addressed on a case by case basis relevant to the facts. In the instant case, an Order has been issued against person(s) not named in the original complaint, who have not been served, or otherwise joined – aside from some late order that changes the caption to include those names. Without any attempt of compliance with the law or applicable procedural rules they find themselves deprived of property and rights – most significantly in constitutional due process or presenting a defense. A core item to which the Supreme Court has stated is grounds to address an interlocutory order.

The record further develops that the judiciary and opposing counsel in the matter have engaged in ex parte communications, been involved in violations of state statutes providing for criminal prosecution, violations of federal law, and acted without personal or subject matter jurisdiction leading up this event.

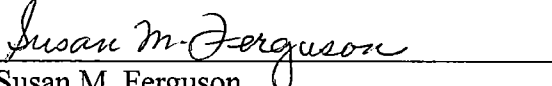
Wherefore, premises considered, Appellants would respectfully submit that the relief requested by Movant be denied.

Respectfully submitted,

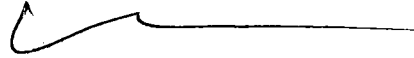
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I certify, that on this date, I served a copy of the Appellants Response to Plaintiffs' Motion, dated 07/06/2017 on Plaintiff's Attorney of record by

_____ delivering it to him/her personally; or,

_____ mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows; or,

X mailing it to the address indicted by their counsel of record in the Summons as follows:

Rodney M. Brown
210 S Main St
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This the 7th day of July, 2017.

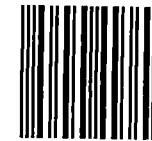


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